APPENDIX A

In the United States Court of Appeals
for the Seventh Circuit

No. 99-3117

CYNTHIA TAYLOR and REBECCA SMITH,
Plaintiffs-Appellants,

V.

HAMILTON CARMOUCHE, MARGARET FELTON, and CITY OF GARY, INDIANA,
Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Indiana, Hammond Division.
No. 2:96 CV 504 -Andrew P. Rodovich, Magistrate Judge.

ARGUED FEBRUARY 22, 2000-DECIDED MAY 24, 2000

Before COFFEY, EASTERBROOK, and WILLIAMS, Circuit Judges.

EASTERBROOK, Circuit Judge. After Hamilton Carmouche was promoted to Corporation Counsel of Gary, Indiana, he needed to appoint a City Attorney, the No. 2 position. He chose Margaret Felton, which caused an uproar

among the secretaries in the office. It was not just that Felton is white, while Carmouche, most of the other attorneys and staff, and most residents of Gary are black. The problem was that people thought that Felton would be a taskmaster-as she turned out to be (for example, she had a time clock installed). The next year was filled with strife: staff members complained to Carmouche and went over his head when he backed Felton. Displeased with efforts to undermine his position and that of his chosen second in command, Carmouche disciplined several of the insurgents. By the end of that year our two plaintiffs-Cynthia Taylor, a lawyer in the office, and Rebecca Smith, a secretary and paralegal-were gone. Soon Carmouche and Felton followed them to private life, as they had lost the confidence of Mayor Barnes. He, too, was replaced before much longer, having decided not to run for reelection in 1995.

Taylor was hired in June 1993, fresh from law school, and last worked for the Law Department in October 1994, when she took maternity leave. When Taylor sought to return in December, Carmouche demanded a medical clearance in light of Taylor's contention that she needed therapy three days a week to address her inability to climb stairs-a serious problem at the Law Department, located on the fourth floor of a building whose elevator does not go higher than the third floor. Taylor did not respond for a month, and the physician's opinion she finally secured in January said that she could not climb stairs or work more than four hours a day. Carmouche told Taylor that she would be welcome to come back when she could work full time; instead she found other employment and sued for wrongful discharge, contending that Carmouche retaliated against her on account of her complaints about his (and Felton's) stewardship of the Law Department. Claims under the Americans with Disabilities Act, the Family Medical Leave

Act, and Title VII of the Civil Rights Act of 1964 have dropped by the wayside. In this court Taylor's sole contention, based on 42 U.S.C. §1983, is that Carmouche violated her rights under the first amendment by penalizing her for speech about matters of public concern.

Smith joined the Law Department in 1991 and was satisfied with her situation until February 1994, when Felton became City Attorney. Smith complained in general terms to both Carmouche and Mayor Barnes that Felton is a "racist," and Smith perceives that she suffered as a result. Felton issued Smith a written warning for taking too much time for lunch and complained in writing to Carmouche about Smith's unwillingness to attend a professional seminar. Felton delivered a verbal warning for using profanity and failing to treat others with respect. In July Felton spoiled a surprise birthday party that Smith and other secretaries had planned for a co-worker, telling the object of the party to "call off the dogs.' When Smith paged Carmouche to return to the office so that she could complain in writing about Felton's reference to the secretaries as "dogs," Carmouche blew up and called Smith's memo "a piece of shit" and handed her a written order (dated ten days earlier) suspending her for failing to provide certain documents to the City Council in a timely fashion. Smith appealed this suspension to the City's personnel committee, where both she and Taylor testified that Smith was being singled out for alleging that Felton is a racist. Smith prevailed on this grievance but soon was suspended again, and her additional grievances were unsuccessful. (She does not contend in this litigation that any of the additional suspensions was unjustified. Nor does she complain about the multiple written warnings for tardiness and insubordination that were placed in her file before Felton's appointment.) Smith quit in October 1994 and labels this a

constructive discharge.

Carmouche was not pleased by Smith's decision to go over his head, or by Taylor's criticism of his management decisions, and let both of them know it. Taylor, who had been working in a detached office on the third floor (large enough for one attorney and one secretary) to accommodate her leg injury, was ordered back to the fourth floor for closer supervision. She appealed to Gary's chief operating officer, who told her to stay put. Taylor then went home and was not present for a visit from Carmouche and Felton, who suspended her for abandoning her job. Taylor filed another grievance, sought medical leave for the period of the suspension, and also applied for maternity leave.

When Felton initially granted a shorter period of leave than Taylor sought, she filed a grievance about that decision too, this time with the City's personnel director. Taylor returned to work and filed a workers' compensation claim, asserting that all time off had been attributable to an injury sustained on the job, and filed yet another grievance, this time asserting retaliation for testifying at Smith's grievance hearing. For the first time, Taylor went outside the City's personnel hierarchy; she turned to the United States Department of Labor, asserting in a letter that she was the victim not only of retaliation for speech but also of racial discrimination. Meanwhile Taylor commenced her maternity leave, which was to last until mid-December. Taylor reported back to work on December 19, and her answer to Carmouche's question whether she was able to work full time led to his request for a physician's evaluation and what happened then we have already described.

Magistrate Judge Rodovich, presiding by consent under 28 U.S.C. §636(c), granted judgment as a matter of law to the City of Gary on the first amendment claims at the close of

plaintiffs' case. Municipalities are not vicariously liable in litigation under §1983. Monell v. New York Department of Social Services, 436 U.S. 658 (1978). That Carmouche was a department head does not affect application of the Monell principle. Auriemma v. Rice, 957 F.2d 397 (7th Cir. 1992). Unless the City had a policy of retaliating against protected speech-and neither Taylor nor Smith contends this-it cannot be liable. If Carmouche or Felton retaliated against protected speech, then they violated rather than implemented Gary's personnel policy, so the §1983 claim against the City was rightly dismissed.

Evidence concerning plaintiffs' remaining claims showed that Felton alienated the secretaries by insisting that they work harder, that the secretaries perceived her as condescending, and that Carmouche was touchy, insensitive, profane, and in many other respects a poor manager. None of these is a federal offense, however, and the magistrate judge concluded that Smith, at least, had nothing else to go on. After plaintiffs' case the magistrate judge granted judgment as a matter of law against Smith (and in substantial measure against Taylor), ruling that none of the events within the City's chain of command was speech protected by the first amendment against retaliation. All of the statements, protests, and grievances were internal personnel matters, dealing with the situations of the plaintiffs rather than matters of general public concern, the magistrate judge concluded. See Connick v. Myers, 461 U.S. 138 (1983); Waters v. Churchill, 511 U.S. 661 (1994). The letter to the Department of Labor, however, was not an internal affair, and retaliation against Taylor for writing this letter could support recovery, the court stated. The jury returned a verdict in Taylor's favor against Carmouche on this theory, awarding a total of $80,000 in damages: $14,000 for lost wages and benefits, $6,000 for other loss, and $60,000

as punitive damages. On all other theories of liability (for example, Title VII and the FMLA), the jury's verdict was for defendants.

After the verdict the court entered judgment as a matter of law in Carmouche's favor under Fed. R. Civ. P. 50(b)(1)(C), and conditionally awarded Carmouche a new trial in the event we should disagree with this disposition. See Fed. R. Civ. P. 50(c)(1). The magistrate judge believed that the three-month lapse between Taylor's letter to the Department of Labor and Carmouche's decision not to allow Taylor to return from leave was too great to support an inference that the former precipitated the latter. Given the rule that all evidence and inferences must be taken in the light most favorable to the verdict, this observation does not permit the court to set aside the jury's conclusion. Taylor went on leave soon after sending the letter, and Carmouche demanded medical clearance the very day she returned. The length of Taylor's maternity leave cannot preclude, as a matter of law, an inference that Carmouche imposed a penalty for criticism.

What does preclude the inference is the absence of any evidence that what Carmouche did was a penalty. Gary requires all employees returning from any health-related leave to provide medical evidence of fitness for duty. Carmouche did no more than enforce this rule. Whatever intentions or hopes Carmouche may have harbored, enforcing a policy applicable to all employees cannot reasonably be described as a penalty for speech. (No evidence of record implies that Carmouche enforced the rule selectively.) To find a penalty, therefore, Taylor would have to point to the decision of January 1995, when Carmouche declined to allow her to work part time. But Taylor does not contend that the January 1995 decision was retaliation for her letter to

the Department of Labor.

Although plaintiffs chastise the magistrate judge for removing from the jury's purview the decision whether the remaining grievances and protests dealt with matters of general public concern, their status is a question of law rather than fact, so the court rather than the jury is the proper decision maker. Connick, 461 U.S. at 148 n.7. Our review is plenary, id. at 150 n.10, and we agree with the magistrate judge's resolution. Three principal considerations persuade us that the magistrate judge was right in thinking these grievances covered by Connick.

First, as in Connick, all of the questioned speech took place within the employer's personnel hierarchy and canceled the management of the labor force. Smith and Taylor complained about Felton to Carmouche, and then to Carmouche's superiors. That Gary's personnel committee sometimes takes formal testimony rather than resolving grievances in other ways does not turn the subject from management to politics. In Connick itself ,the Court concluded that some of the speech concerned issues of public concern, but it held that the speech as a whole must be deemed work-related, in large measure because it all occurred within the workplace and concerned supervisory management styles-which is, in the end, pretty much what Smith and Taylor were complaining about.

Second, as in Connick and Waters, Smith and Taylor were protesting in their capacity as employees, not in their capacity as citizens. Their complaints related to their jobs. Taylor believes that she rather than Felton should have been promoted and that her leg injury should have been accommodated by allowing her to continue working on the third floor; Smith believes that she should have been

allowed to hold surprise parties without interference, contends that her belated document delivery was someone else's fault, and believes that her supervisors used too much crude language. These are normal workplace grievances, and statements made in an employment setting about how the tasks should be carried out are appropriate subjects for reaction by management, without constitutional obstacles. Wales v. Board of Education, 120 F.3d 82, 84-85 (7th Cir. 1997). None of the statements was offered as a political view about what legal policies the City of Gary should adopt, or even as a view about the City's organizational structure. Smith and Taylor were not engaged in a debate about whether it was desirable, say, for Gary to hire racists; they contended, rather, that race influenced what happened to them, on the job. None of the defendants' responses affected political discourse. As Justice O'Connor observed in Waters, 511 U.S. at 672-75 (some internal citations omitted):

> [Even many of the most fundamental maxims of our First Amendment jurisprudence cannot reasonably be applied to speech by government employees. The First Amendment demands a tolerance of "verbal tumult, discord, and even offensive utterance," as "necessary side effects of ... the process of open debate," Cohen v. California, 403 U.S. 15, 24-25 (1971). But we have never expressed doubt that a government employer may bar its employees from using Mr. Cohen's offensive utterance to members of the public or to the people with whom they work.... [When an employee counsels her co-workers to do their job in a way with which the public employer disagrees, her managers may tell her to stop, rather than relying on counter speech. ... [Though a private person is perfectly free to uninhibitedly and robustly criticize a state governor's legislative program, we have never suggested that the Constitution bars the

governor from firing a high-ranking deputy for doing the same thing. Even something as close to the core of the First Amendment as participation in political campaigns may be prohibited to government employees. ...

> This does not, of course, show that the First Amendment should play no role in government employment decisions. Government employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions. And a government employee, like any citizen, may have a strong, legitimate interest in speaking out on public matters. In many such situations the government may have to make a substantial showing that the speech is, in fact, likely to be disruptive before it may be punished. ...
> ... [The extra power the government has in this area comes from the nature of the government's mission as employer. Government agencies are charged by law with doing particular tasks. Agencies hire employees to help do those tasks as effectively and efficiently as possible. When someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her. The reason the governor may, in the example given above, fire the deputy is not that this dismissal would somehow be narrowly tailored to a compelling government interest. It is that the governor and the governor's staff have a job to do, and the governor justifiably feels that a quieter subordinate would allow them to do this job more effectively.

The key to First Amendment analysis of government

employment decisions, then, is this: The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer. The government cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate.

Carmouche and Felton acted in their capacity as supervisors of the Law Department rather than as regulators of private speech, which under Waters they may do without violating the first amendment.

Third, Smith and Taylor offered their assertion that Felton is a "racist" the only statement that plaintiffs characterize as raising an issue of public concern-as a proposition of fact rather than of opinion, though it is principally the latter that the first amendment protects. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974); *Stevens v. Tillman*, 855 F.2d 394, 398-402 (7th Cir. 1988). The statement at issue *in Rankin v. McPherson*, 483 U.S. 378 (1987), an employee's wish that the President be assassinated, asserted a political stance. But whether a given supervisor is a racist, or practices racial discrimination in the workplace, is a mundane issue of fact, litigated every day in federal court. "Felton is a racist" is defamatory, and a person who makes an unsupported defamatory statement may be penalized without offending the first amendment. Whether that penalty is delivered in a slander action, in a perjury prosecution, in an award of attorneys' fees for making unsubstantiated allegations, or in the workplace by a suspension, is immaterial to the Constitution. What matters is that defamation of a co-worker may be punished, and as we pointed out in *Feldman*

v. Ho, 171 F.3d 494, 497-98 (7th Cir. 1999), whether a particular defamatory statement is true or false is not a question of constitutional moment, unless the target is a "public figure," which Felton wasn't. See also *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18-23 (1990); *In re Palmisano*, 70 F.3d 483 (7th Cir. 1995). The Court held in Waters that so long as the employer honestly and reasonably believes that workplace speech is inappropriate or disruptive, then the Constitution permits a response whether the speech in question was true or false, disruptive or not.

Smith and Taylor pressed their grievances through the machinery Gary provided to its employees. Sometimes they won; sometimes they lost. They were not entitled to take their losses to federal court and ask a jury to second guess, in the name of the Constitution, the decisions of the personnel hierarchy.

AFFIRMED

WILLIAMS, Circuit Judge, dissenting. I respectfully dissent. While I agree with the majority's resolution of Cynthia Taylor's claim relating to her reinstatement after her medical leave, I disagree with the majority's resolution of the plaintiffs' other claims. Specifically, I am not persuaded that the magistrate judge correctly ruled that the plaintiffs' protests within the City of Gary's chain of command did not deal with matters of public concern.

As I read the record, the plaintiffs' protests were an effort to challenge racism in the City's Law Department. In a variety of forums and on several occasions they raised their concerns about racism on the part of both Margaret Felton and Hamilton Carmouche. Most significantly, they went directly to both the City's Mayor and Deputy Mayor in their effort to speak out. And, there is no indication in the record

that their protests were restricted to their individual concerns; rather, it appears that they were speaking out on behalf of the entire office. In light of these facts, I cannot conclude that the plaintiffs' protests regarding racism in the City's Law Department were simple workplace grievances that do not address matters of public concern. See generally *Marshall v. Allen*, 984 F.2d 787, 795-96 (7th Cir. 1993); *Tindall v. Montgomery County Comm'n*, 32 F.3d 1535,1539-40 (11th Cir. 1994). Assuming it is not related entirely to a private dispute between the plaintiff and defendant, racism in a public agency is inherently a matter of public concern. See *Connick v. Myers*, 461 U.S. 138, 148 n.8 (1983) (noting that racial discrimination is a matter inherently of public concern).

Moreover, that the plaintiffs' protests were communicated within the City's chain of command does not strike me as a particularly strong reason to deem their protests matters of private concern. The plaintiffs' should not be penalized for taking advantage of internal procedures for raising their concerns, instead of running to the press the first chance they had. See *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410, 413-14 (1979) (expressing one's views privately rather than publicly does not forfeit the first amendment protections afforded a government employee); *Hulbert v. Wilhelm*, 120 F.3d 648, 654 (7th Cir. 1997) (noting that the plaintiff-employee was, if anything, to be commended for attempting to go through established internal channels).

As for the majority's suggestion that the plaintiffs' protests about racism in the Law Department were defamatory and therefore are not entitled to constitutional protection, I think the majority collapses two distinct areas of first amendment law. One area regards the limitations placed on a government when it acts in its sovereign capacity to penalize or authorize penalties for defamation.

The other addresses the limitations placed on a government when it acts in its capacity as an employer to discipline one of its employees based on that employee's speech. In light of the distinct situations that must be addressed, quite different standards apply in these two areas. Whether defamation may be punished depends on whether the subject of the defamatory statement is a public official, public figure, or private figure, whether the defamatory statement involves a matter of public concern, and whether the defamatory statement is a proposition of fact. See generally *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (plurality opinion). Moreover, truth is an absolute defense. Whether a government employee may be disciplined for his or her speech depends on whether the speech addresses a matter of public concern and whether the government's interest in efficiency outweighs the employee's interest in speaking out. See generally *Connick v. Myers*, supra; *Pickering v. Board of Education*, 391 U.S. 563 (1968). Truth is not a defense. Collapsing these distinct standards confuses the issues presented by this case. Contrast *Waters v. Churchill*, 511 U.S. 661, 671-75 (1994) (plurality opinion) (making a point of distinguishing the sorts of the first amendment restrictions placed on a government in its sovereign capacity and those placed on a government in its capacity as an employer). In fact, as this case is plainly governed by the law regarding employee speech, there is no need to discuss the law of defamation at all.

A true Copy:

Teste:

Clerk of the United States Court of
Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

CYNTHIA TAYLOR and REBECCA SMITH, *Plaintiffs*	)	
V.	)	Case No. 2:96 CV 504
HAMILTON CARMOUCHE, Individually and as an Agent of the City of Gary; MARGARET FELTON, Individually and as an Agent of the City of Gary; CITY OF GARY, *Defendants*	)	

ORDER

This matter is before the court on the Post-Trial Motion filed by the defendant, Hamilton Carmouche, on July 16, 1998, the Motion for a New Trial filed by the plaintiffs, Cynthia Taylor and Rebecca Smith, on July 17, 1998, and the Motion for Attorney Fees filed by the plaintiff, Cynthia Taylor, on August 5, 1998. For the reasons set forth below, the defendant's Post-Trial Motion is GRANTED, the plaintiffs, Motion for a New Trial is DENIED, and the Motion for Attorney Fees in DENIED.

Background

The plaintiff, Cynthia Taylor, was employed as an attorney with the City of Gary Law Department from June, 1993, until December, 1994. The plaintiff, Rebecca Smith, worked for the law department as a legal secretary and paralegal from 1991 until her resignation in October, 1994. The defendant, Hamilton Carmouche, was the head of the law department, and the defendant, Margaret Felton, was an attorney with the law department. Taylor, Smith, and Carmouche are African Americans, and Felton is White.

In May, 1993, Carmouche decided to hire another assistant city attorney for the law department and asked Smith, his secretary at the time, for her opinion on whether he should hire Felton or Taylor. Smith claims that Carmouche told her that he thought Taylor was more qualified for the position but that he needed a white attorney. Smith responded to Carmouche's comments telling him that she did not think it was fair to hire Felton simply because of her race. Carmouche ultimately hired both Felton and Taylor.

In February, 1994, Carmouche spoke with Smith about who he should promote to the position of city attorney. Smith told Carmouche that she felt Felton was condescending and a racist and should not be given the position. Taylor likewise expressed an opinion that Felton was a racist and not a good choice for the position. Despite these negative endorsements, Carmouche appointed Felton as the city attorney. According to Smith, Carmouche informed Felton of her comments and that Felton's behavior towards her began to change. Taylor claimed that her relationship with Felton also deteriorated following Felton's appointment as city attorney.

In December, 1993, Taylor slipped and fell down a flight of stairs at work and tore the ligaments in her lower

right leg and ankle. Following the accident, Taylor was given code enforcement responsibilities on the third floor of the law department. This was an accommodation for her condition because Taylor no longer was required to climb a flight of stairs to the fourth floor office of the law department.

On July 22, 1994, Taylor sent Carmouche a memo requesting time off three days a week for physical therapy on her ankle. The need for the physical therapy related to the fact that Taylor had become pregnant, which increased the weight on her ankle, and could not take any medication. Taylor's request for time off was granted.

In August, 1994, Taylor testified at a grievance hearing on behalf of Smith. Her testimony concerned racially discriminatory conduct within the law department. Following the grievance hearing, Taylor received a memo informing her that she was to begin reporting to the fourth floor of the law department. The next day Taylor requested a three-month medical leave.

On September 1, 1994, Felton suspended Taylor five days for walking off the job. Taylor immediately filed a grievance. Before the grievance hearing, however, Taylor returned to work. Although Taylor was permitted to return to the third floor, she was not given code enforcement responsibilities.

On September 23, 1994, Taylor filed a complaint with the Department of Labor. In her complaint, Taylor detailed the events which had transpired between Smith's grievance hearing and her return to work on September 19, 1994. Taylor alleged that the decision not to allow her to take medical leave was in retaliation for her testimony against the defendants at the grievance hearing. Taylor also claimed that the adverse treatment she had received was motivated by racial and gender considerations. According to Taylor, both Felton and Carmouche were aware of the letter.

On September 30, 1994, Taylor notified Carmouche that she planned to begin her maternity leave on October 31, 1994. Felton approved the leave on October 4, 1994, but informed Taylor that upon her return from maternity leave she would be assigned to the fourth floor with no code enforcement responsibilities.

On December 19, 1994, Taylor attempted to return from her maternity leave. When Taylor advised Carmouche that she would need three days of physical therapy a week and that she would have to leave early on those days, he placed her on medical leave pending a medical evaluation on whether Taylor could physically return to work. Taylor never provided the requested medical certification and ultimately sought employment elsewhere.

On September 26, 1996, Taylor filed a complaint against the City of Gary, Hamilton Carmouche, and Margaret Felton alleging discrimination under the Americans with Disabilities Act, 42 U.S.C. § 12101 et. seq., the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601 et. seq., and Title VII of the Civil Rights Act of 1963 ("Title VII"), 42 U.S.C. § 2000e et. seq. In the same complaint, Taylor and Smith also alleged discrimination under 42 U.S.C. § 1981 and a violation of their First and Fourteenth Amendment rights. A pre-trial order submitted by the parties on June 30, 1998, reasserted all the legal claims that were alleged in the complaint with the exception of Smith's Section 1981 claim. Pursuant to Federal Rule of Civil Procedure 16(e), it was held that the pre-trial order superseded the complaint and established the issues to be decided at trial.

A four-day jury trial commenced on July 6, 1998. At the close of the plaintiffs, case in chief, the court granted in part the defendants, motion for a directed verdict and denied Smith's motion to amend the pre-trial order to reassert her Section 1981 claim. As a result, Smith was

dismissed from the case. The defendants later renewed their motion for a judgment as a matter of law following the presentation of all the evidence. The court denied the defendants, motion and submitted the following questions to the jury: 1) did the City of Gary discriminate against Taylor on the basis of sex and/or race in violation of Title VII; 2) did the City of Gary retaliate against Taylor for complaining about racist or sexist conduct in violation of Title VII; 3) did the defendants retaliate against Taylor for filing a workers' compensation claim; 4) did the defendants deny Taylor the right to be restored to her former position, or an equivalent position, upon her return from medical leave in violation of the FMLA; 5) did Carmouche and/or Felton retaliate against Taylor for filing charges of race discrimination in violation of Section 1981; and 6) did Carmouche and/or Felton retaliate against Taylor for protesting racially discriminatory conduct on the part of the defendants in violation of the First Amendment. In response to a jury question concerning the First Amendment retaliation claim, the court instructed the jury that the only protected speech at issue was the September 23, 1994, letter from Taylor to the Department of Labor.

Following its deliberations, the jury returned a verdict against Carmouche on the First Amendment retaliation claim and awarded Taylor $14,000 in lost wages and benefits, $6,000 in other compensatory damages, and $60,000 in punitive damages. On the remaining claims, the jury found in favor of the defendants. Carmouche now moves for a judgment notwithstanding the verdict pursuant to Federal Rule of Civil Procedure 50(b) or, alternatively, for a new trial pursuant to Federal Rule of Civil Procedure 59(a) on the First Amendment retaliation claim. The plaintiffs also move for a new trial, Taylor on her FMLA and First Amendment retaliation claims and Smith on her Section 1981 and First Amendment retaliation claims. In a separate motion, Taylor requests attorney fees as the prevailing party

pursuant to 42 U.S.C. § 1988.

Discussion

A. Defendant Carmouche's Post-Trial Motion

> Under Federal Rule of Civil Procedure 50(a)(1), the defendant may request a judgment as a matter of law if "there is no legally sufficient evidentiary basis for a reasonable jury to find for" the plaintiff. Rule 50(b) provides in part: If, for any reason, the court does not grant a motion for judgment as a matter of law made at-the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion.
>
> The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment and may alternatively request a new trial or join a motion for a new trial under Rule 59.
>
> . . .

A motion for a judgment as a matter of law after the jury has returned a verdict against a defendant is an extension of the motion made at the close of all of the evidence.

In the instant case, the defendants made a motion for judgment as a matter of law after the plaintiffs, case in chief. The defendants later renewed that motion at the close of all the evidence and before the case was submitted to the jury. Thus, contrary to Taylor's argument, Carmouche is entitled to a judgment as a matter of law if there is no evidence to

support the jury's verdict in favor of Taylor on her First Amendment retaliation claim. See *Tincher v. Wal-Mart Stores, Inc.*, 118 F.3d 1125, 1129 (7th Cir. 1997). *Cf. Eastern Natural Gas Corporation v. Aluminum Company of America*, 126 F.3d 996, 1000 (7th Cir. 1997) (finding that defendants failed to preserve a Rule 50 argument by not renewing their motion after the close of evidence); *Umpleby v. Potter & Brumfield, Incorporated*, 69 F.3d 209, 212 (7th Cir. 1995) (same).

To prevail on a First Amendment retaliation claim, the plaintiff must prove (1) that she engaged in constitutionally protected speech and (2) that the defendant retaliated against her because of that speech. *Button v. Kibby-Brown*, 146 F.3d 526, 529 (7th Cir. 1998); *Gustafson v. Jones*, 117 F.3d 1015, 1018 (7th Cir. 1997); *Caldwell v. City of Elwood, Indiana*, 959 F.2d 670, 672 (7th Cir. 1992). The plaintiff satisfies the first prong if the speech addressed a matter of public concern and her "interests, as a citizen, in commenting upon these matters outweighed those of the state, as an employer, in promoting the efficiency of the public services performed through its employees." Go 977 F.2d at 355 (*quoting Patkus v. Sangamon-Case Consortium*, 769 F.2d 1251, 1256 (7th Cir. 1985)). See also *Waters v. Churchill*, 511 U.S. 661, 668, 114 S.Ct. 1878, 1884, 128 L.Ed.2d 686 (1994); *Township High School Pickering v. Board of Education of District 205*, 391 U.S. 563, 574, 88 S.Ct. 1731, 1737, 20 L.Ed.2d 811 (1968) ; *Weicherding v. Reigel*, 160 F. 3d 1139, 1142 (7th Cir. 1998); *Khuans v. School District 110*, 123 F.3d 1010, 1014 (7th Cir. 1997). Resolution of the so-called Pickering balancing test is a question of law which must be decided by the court. *Brown v. Disciplinary Committee of the Edgerton Volunteer Fire Department*, 97 F.3d 969, 974 (7th Cir. 1996); Probst v. Bitzer, 39 F.3d 148, 152 (7th Cir. 1995).

For purposes of his motion, Carmouche does not challenge the court's conclusion that the 1994 letter to the

Department of Labor addressed a matter of public concern, race discrimination by governmental officials, or that Taylor's interest, as a citizen, in commenting on the matter outweighed the City of Gary's interests as an employer. The only issue raised is whether the evidence supports the jury's verdict that Carmouche retaliated against Taylor cause of her letter to the Department of Labor.

Carmouche argues that the evidence presented at trial was insufficient to support the jury's finding that protected speech was a motivating factor in any adverse employment action taken against Taylor. Taylor maintains that there was sufficient evidence to support the jury's finding that Carmouche was aware of the Department of Labor letter and that Carmouche retaliated against her by not allowing her to return from maternity leave on December 19, 1994.

At trial, the burden was on Taylor to prove by a preponderance of the evidence that protected speech was a substantial or motivating factor behind the adverse employment action taken against her. *Klunk v. County of St. Joseph*, 170 F.3d 772, 775 (7th Cir. 1999); Johnson v. *University of Wisconsin-Eau Claire*, 70 F.3d 469, 482 (7th Cir. 1995). To meet her burden, Taylor first had to establish that Carmouche knew of the protected speech. *Stagman v. Ryan*, 176 F.3d 986, 999 (7th Cir. 1999). Although the evidence on this issue was not conclusive, it was sufficient for the jury to conclude that Carmouche knew about the Department of Labor letter.

Next, Taylor had to establish a causal link between the protected speech and the adverse employment action taken against her. *Johnson v. Zema Systems Corporation*, 170 F.3d 734, 746 (7th Cir. 1999). "Generally, a plaintiff may establish such a link through evidence that the [adverse employment action) took place on the heels of protected activity." *Filipovic v. K&R Express Systems, Incorporated*, 176 F.3d 390, 399 (7th Cir. 1999). See *King v. Preferred Technical Group*, 166 F.3d

889, 893 (7th Cir. 1999) (finding one day gap between protected activity and adverse employment action sufficient); *Eiland v. Trinity Hospital*, 150 F.3d 747, 753 (7th Cir. 1998) (finding one month gap sufficient); *McClendon v. Indiana Sugars, Inc.*, 108 F.3d 789, 797 (7th Cir. 1997) (finding 2-3 day gap sufficient). On the other hand, "[a] substantial time lapse between the protected activity and the adverse employment action is 'counter-evidence of any causal connection.'" *Filipovic*, 176 F.3d at 399 (finding four month gap between protected activity and adverse employment action insufficient) . *See Parkins v. Civil Constructors of Illinois, Inc.*, 163 F.3d 1027, 1039 (7th Cir. 1998) (finding three month gap insufficient). Where the time frame between the protected activity and the adverse employment action is insufficient to establish a causal link, the plaintiff must present additional evidence which suggests that the defendant's actions were done in retaliation for having engaged in protected speech. See *Zema*, 170 F.3d at 746.

Because the three month gap between the filing of the Department of Labor letter and Carmouche's decision not to allow Taylor to return from her leave without a medical certification negates any inference of a causal link between the two events, and because Taylor did not come forward with any additional evidence suggesting a causal link between her protected speech and the adverse employment action, no reasonable jury could have found that Carmouche retaliated against Taylor for filing a complaint with the Department of Labor in violation of the First Amendment. After requesting time off for physical therapy in June, 1994, Taylor returned from her maternity leave with another request for time off for more physical therapy. The Gary personnel manual required an employee returning to work to provide a doctor's release, and Carmouche's decision to enforce the requirement was justified.

As an alternative to his motion for judgment as a

matter of law, Carmouche has requested a new trial. Pursuant to Rule 50(c)(1), the court must conditionally rule on Carmouche's alternative motion for a new trial even though the renewed motion for judgment as a matter of law has been granted.

Under Rule 59(a), a new trial may be granted if the district court determines that the verdict was against the weight of the evidence. *Reimer v. Illinois Department of Transportation*, 148 F.3d 800, 806 (7th Cir. 1998); *McClain v. Owens-Corning Fiber-glass Corporation*, 139 F.3d 1124, 1126 (7th Cir. 1998); *Medcom Holding Company v. Baxter Travenol Laboratories, Inc.*, 106 F.3d 1388, 1397 (7th Cir. 1997). In determining whether to grant a new trial, a district court must view the evidence along with all reasonable inferences in the light most favorable to the verdict and resolve any conflicts in favor of the nonmoving party. *Jannotta v. Subway Sandwich Shops, Inc.*, 125 F.3d 503, 505 (7th Cir. 1997); *Frazell v. Flanigan*, 102 F.3d 877, 882 (7th Cir. 1996); *Emmel v. Coca-Cola Bottling Company of Chicago*, 95 F.3d 627, 629 (7th Cir. 1996). "[A] motion for a new trial is addressed to the sound discretion of the trial judge and will be reviewed only for an abuse of discretion." *Robinson v. Lescrenier*, 721 F.2d 1101, 1104 (7th Cir. 1983). See *also Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 433, 116 S.Ct. 2211, 2222-23, 135 L.Ed.2d 659 (1996); *Reimer*, 148 F.3d at 805; *Medcom*, 106 F.3d 1397. Only if no reasonable basis exists in the record to support the verdict should a new trial be granted. *Tincher*, 118 F.3d at 1129; *Mercado v. Ahmed*, 974 F.2d 863, 866 (7th Cir. 1992).

As previously discussed, there is insufficient evidence to establish a causal link between the filing of the Department of Labor letter and Carmouche's decision not to allow Taylor to return from her leave without a medical certification. Accordingly, the motion for a new trial is conditionally granted.

B. Plaintiffs' Motion for a New Trial

First, Smith argues that the court should have allowed her to amend the pre-trial order and reassert her Section 1981 claim. Federal Rule of Civil Procedure 15(b) provides:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after the judgment; but failure so to ,amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits.

The purpose of Rule 15(b) is to "provide the maximum opportunity for each claim to be decided on its merits rather than on procedural niceties." *Matter of Prescott*, 805 F.2d 719, 725 (7th Cir. 1986).

Federal Rule of Civil Procedure 16(e) also provides for the modification of pre-trial orders but "only to prevent manifest injustice." At trial, the court found that there would be manifest injustice to the defendants if Smith were allowed

to amend the pre-trial order and reassert her Section 1981 claim.

Contrary to Smith's argument, there is no evidence of manifest injustice as a result of the court's decision to deny her leave to amend the pre-trial order. Section 1981 prohibits racial discrimination in the making and enforcement of private contracts. *Patterson v. McLean Credit Union*, 491 U.S. 164, 173, 409 S.Ct. 2363, 2370, 105 L.Ed.2d 132 (1989); *Majeske v. Fraternal order of Police, Local Lodge No. 7*, 94 F.3d 307, 312 (7th Cir. 1996); *Day v. Northern Indiana Public Service Company*, 987 F.Supp. 1105, 1114 (N.D. Ind. 1997). To prevail on a Section 1981 claim, the plaintiff must prove that (1) she is a member of a racial minority, (2) the defendant intended to discriminate on the basis of race, and (3) the discrimination concerned one or more of the activities enumerated in the statute. *Morris v. Office Max, Inc.*, 89 F.3d 411, 413 (7th Cir. 1996); Day, 987 F.Supp. at 1114. A retaliation claim under Section 1981 requires a showing that the retaliation was motivated by racial considerations. *Daniels v. Pipefitters' Association Local Union No. 597*, 945 F.2d 906, 917 (7th Cir. 1991); *McKnight v. General Motors Corporation*, 908 F.2d 104, 111 (7th Cir. 1990). Because the evidence presented by Smith did not support a finding that the defendants discriminated against her because of her race, or retaliated based on racial considerations, she was not entitled to an amendment of the pre-trial order under Rule 15(b) or Rule 16(e).

Next, Taylor argues that the jury's verdict in favor of the defendants on her FMLA claim is against the great weight of the evidence. The FMLA entitles eligible employees to a total of 12 weeks of leave during any 12 month period for, among other reasons, "a serious health condition that makes the employee unable to perform the functions of [her] position." 29 U.S.C. 2612 (a) (1) (D); *Haschmann v. Time Warner Entertainment Company, L.P.*, 151

F.3d 591,604 (7th Cir.. 1998). An employee who exercises his right to leave under the FMLA must be restored to his former position, or an equivalent position, upon his return from leave. 29 U.S.C. § 2614(a)(1). Employers are liable if they "interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under the [FMLA]." 29 U.S.C. § 2615.

In the court's instructions, the jury was told that "an employer can delay restoration to an employee who fails to provide a fitness for duty certification to return to work." See Court's Instruction No. 19. The jury also was told that

> [the mere fact that Taylor took medical leave and was not reinstated after completion of her leave is not sufficient, in and of itself, to establish her claim under the Family and Medical Leave Act. Taylor has the burden of proving by a preponderance of the evidence that the defendants, actions were motivated because she took medical leave.
>
> Court's Instruction No. 22

Although 29 C.F.R. § 825.301(c) requires an employer to provide written notice to employees detailing any rights or obligations they may have under the FMLA, including any requirement that the employee present a fitness for duty certificate before returning to work, Taylor never requested a jury instruction on the issue, nor did she object to any of the jury instructions addressing her FMLA claim. Taylor's argument that the jury should have found in her favor based on the fact that the defendants did not notify her of the medical certification requirement prior to her FMLA leave has been waived. See *Haley v. Gross*, 86 F.3d 630, 644 (7th Cir. 1996) ("[failure to challenge a jury instruction in a civil case constitutes waiver of that challenge . . . ."); *Abel v. Miller*,

824 F.2d 1522, 1535 (7th Cir. 1987) ("in a civil case each party must live with the legal theory reflected in instructions to which it does not object.,"). Because there was sufficient evidence from which the jury could conclude that the defendants delayed reinstatement based on Taylor's failure to provide the requested medical certification, Taylor is not entitled to a new trial on her FMLA claim.

Finally, Taylor and Smith argue that the court should not have granted a directed verdict on their respective First Amendment retaliation claims. Taylor argues that the evidence supports a finding that the defendants retaliated against her for testifying on behalf of Smith at a grievance hearing held in August of 1994 and for complaining about race discrimination during private meetings with Carmouche, the mayor, and the deputy mayor. Smith argues that the evidence supports a finding that the defendants retaliated against her for challenging Carmouche's decision to hire Felton because she was white, for opposing Carmouche's decision to promote Felton to city attorney because she considered Felton a racist, and for complaining to t he mayor and deputy mayor about discrimination against black attorneys.

On a First Amendment retaliation claim, the court initially must determine as a matter of law whether the particular speech at issue was constitutionally protected, that is, did the speech address a matter of public concern. See *Brown*, 97 F.3d at 974. In determining whether speech addressed a matter of public concern, the court must consider "the content, form, and context of a given statement, as revealed by the whole record." *Button*, 146 F.3d at 529 (quoting in part *Connick v. Myers*, 461 U.S. 139, 147-48, 103 S.Ct. 1684, 1690, 75 L.Ed.2d 708 (1983)). see also *Marshall v. Porter County Plan Commission*, 32 F.3d 1215, 1219 (7th Cir. 1994). Of the three factors, the content of the speech is the most important. *Button*, 146 F.3d at 529. The plaintiff's

motive in making the statement also is relevant "because speech that promotes a purely private interest is not protected." *Button*, 146 F.3d at 529 (quoting *Marshall*, 32 F.3d at 1219). In addition, while the plaintiff may speak out on a matter of public interest, that fact alone is insufficient to elevate the speech to a matter of public concern when "the expression addresses only the personal effect upon the employee." *Button*, 146 F.3d at 52930 (quoting *Marshall*, 32 F.3d at 1219).

In this case, the court assumes that racism was discussed both in the law department offices and at Smith's August, 1994, grievance hearing. The court also acknowledges that racism is a matter of public interest. However, an examination of all the evidence demonstrates that the motives behind the plaintiffs, complaints of racism were personal and that they were related solely to disagreements that the plaintiffs had with their own working conditions.

> Where considerations of content, form, and context suggest that an employee raised a topic of societal interest for "personal reasons rather than a desire to air the merits of the issue," or solely to "bolster [his) own position in a private personnel dispute with (his] superiors," the speech is not entitled to First Amendment protection. (internal citations omitted)
>
> *Button*, 146 F.3d at 530

The fact that the plaintiffs made no attempt to raise their complaints of race discrimination in a public forum further supports the conclusion that the plaintiffs, speech was not protected under the First Amendment.

C. Plaintiff's motion for Attorney Fees

Taylor has requested $74,370.50 in attorney's fees as the prevailing party in this litigation. Under 42 U.S.C. § 1988, the prevailing party may recover reasonable attorney's fees "if they succeed on any significant issue in the litigation which achieves some of the benefit the parties sought in bringing the suit." *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40 (1983). Based on the decision to grant the defendants, motion for judgment notwithstanding the verdict, Taylor no longer can be considered a prevailing party for purposes of an award of attorney's fees under Section 1988. Taylor's motion therefore is denied.

For the foregoing reasons, the Post-Trial Motion filed by the defendant, Hamilton Carmouche, on July 16, 1998, is GRANTED, the Motion for a New Trial filed by the plaintiffs, Cynthia Taylor and Rebecca Smith, on July 17, 1998, is DENIED, and the Motion for Attorney Fees filed by the plaintiff, Cynthia Taylor, on August 5, 1998, is DENIED. The verdict entered on July 10, 1998, is VACATED. Pursuant to Federal Rule of Civil Procedure 50(c)(1), the defendant Carmouche's request for a new trial is CONDITIONALLY GRANTED.

ENTERED this 19th day of July, 1999.

"s/_____"
Andrew P. Rodovich
United States Magistrate Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

July 20, 2000

BEFORE

Hon. John L. Coffey, Circuit Judge
Hon. Frank H. Easterbrook, Circuit Judge
Hon. Ann Claire Williams, Circuit Judge

Cynthia Taylor and Rebecca Smith, *Plaintiffs-Appellants,*	) Appeal from the) United States District) Court for the Northern) District of Indiana,
No. 99-3117 v.	) Hammond Division
Hamilton Carmouche, Margaret Felton, and City of Gary, Indiana, *Defendants-Appellees.*	) No. 2:96 CV 50) Andrew P. Rodovich,) Magistrate Judge.

Order

Plaintiff-appellant Taylor filed a petition for rehearing and petition for rehearing en banc on June 6, 2000. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.